Filed 2/27/19 P. v. Arzate CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR MARCUS ARZATE, Defendant and Appellant.	B286532 (Los Angeles County Super. Ct. No. VA136663)

APPEAL from the judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed in part, reversed in part and remanded with directions.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo, Theresa A. Patterson, and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Victor Marcus Arzate (defendant) was convicted, along with his codefendant Anthony Michael Delci, of first degree murder. Gang and firearm use allegations were also found true. Defendant was sentenced to state prison for a term of 60 years to life.

Defendant challenges his conviction on numerous grounds. He argues the admission of his pretrial statement to an undercover agent violated his rights under the Fifth and Fourteenth Amendments against self-incrimination. Defendant also contends the prosecutor committed misconduct during closing argument by arguing his opinion of defendant's guilt and improperly vouching for prosecution witnesses. In the alternative, defendant contends his counsel was ineffective for failing to object to the improper argument. Defendant further argues the gang enhancement is not supported by substantial evidence, and that case-specific hearsay was admitted in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Defendant argues prejudicial cumulative error based on the combined prejudice arising from the admission of his confession and the gang evidence, as well as the prosecutorial misconduct. Defendant argues that even if his conviction is affirmed, a remand for resentencing is warranted in light of the amendment of Penal Code section 12022.53 during the pendency of this appeal. Finally, in supplemental briefing, defendant argues two statutory fees must be reversed and the restitution fine stayed in light of the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

We conclude a limited remand is warranted to allow the trial court the opportunity to exercise its sentencing discretion as now afforded by the amended version of Penal Code

section 12022.53, subdivision (h). We affirm defendant's conviction in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Shooting

On the afternoon of August 30, 2014, Joann R.[1] was at her home near La Cuarta Avenue and Washington Street in the city of Whittier. Her adult son, Jonathan R., and adult daughter, Maria G., as well as several other family members were also there. Maria, who had been on the front porch with one of her children and Jonathan, came inside and told her mother not to go outside because a white car had driven by and someone in the car had been "throwing" gang signs.[2]

A few minutes later, Joann and Jonathan went out into the front yard to pick up a few items that had been left outside. Joann saw a man (who she later identified as defendant) standing in the street in front of her house. Defendant yelled at Jonathan "where you from?" Joann understood this to be gang talk. Jonathan yelled back that he was "from nowhere," attempting to indicate he had no gang affiliation.

Looking through a window from inside the house, Maria saw that the white car had returned and one of the passengers was out in the street. She could hear her brother saying that he

---

[1] Because of the gang allegation, we refer to the witnesses and victim by their first names only. We refer to witness G.E. by his initials because he was a minor at the time of the incident and when he testified at trial.

[2] Joann testified that Maria said a passenger had thrown signs. Maria testified she could not really see what the passenger did but thought he had been staring at them, and at her brother in particular.

was "from nowhere" but otherwise could not hear what was being said.

Defendant kept yelling at Jonathan so Joann said "he's from nowhere. What do you want?" By that point, Jonathan had stepped out to the front gate which was open to the sidewalk. Joann noticed that defendant was holding a "shiny" handgun. She yelled at her son that the man had a gun and Jonathan told her to run. Joann turned and headed toward the back yard. From the window, Maria saw her brother turn his back on defendant as if to come back inside the house. And then, defendant started shooting.

Joann heard a gunshot and Jonathan yelling out. When she turned back toward her son, she heard another shot and saw Jonathan fall onto his knees, bleeding, and clutching at the gate. She heard a total of four gunshots. Joann screamed for her daughter as she tried to help her son. Maria and her boyfriend ran outside and someone called 911.

Juan G. witnessed a portion of the incident from his car, as he happened to be driving by that afternoon. Juan and his wife were driving eastbound on La Cuarta Avenue near the intersection with Washington Street. Juan saw two men in the street that appeared to be in a "heated" conversation. His windows were rolled up so he could not hear what they were saying, but they were about four feet apart and he could see they were yelling at each other. One of the men was wearing black shorts, a black tank top, a baseball cap and was holding a "shiny silver" revolver down at his side. Juan tried to drive around them and make a left turn but a white Honda CRV was blocking the alley, so he made a right turn instead. Almost immediately he heard four gunshots. When he looked in his rearview mirror,

he could see the Honda still in the alley facing the street. The man in the black shorts ran toward the white Honda, jumped into the front passenger seat and then the Honda immediately drove off down the street.

Juan did not get a good look at the faces of the men involved in the argument so he could not identify anyone, but after he made his turn down the alley and came around the block, he saw the Honda again, as it was fleeing the scene. He was able to write down the license plate number because of traffic congestion. He saw two, possibly three, people in the Honda. Juan drove back to the where the shooting had occurred to give the police officers the license plate number. Police officers were already on the scene when he arrived.

On that August afternoon, G.E. was 14 years old and had just been jumped into the Pico Nuevo gang the night before by defendant, who used the moniker Suspect, and codefendant Delci, who went by the moniker Toker. Sometime around noon, they were driving around in the city of Whittier in Delci's white Honda CRV. Delci was driving, defendant was in the front passenger seat and G.E. was sitting in the back seat.

When they pulled up to the intersection of La Cuarta Avenue and Washington Street, G.E. saw some people standing outside a house on the corner. G.E. thought they might be gang members because they had a lot of tattoos. G.E. "threw a gang sign" out the window--a "P" for Pico Nuevo. They drove around and eventually came back to that same intersection. One of the men with the tattoos was still standing outside the home near some trash cans. Delci stopped the Honda, and defendant grabbed a silver handgun and got out of the car. G.E. asked Delci what was going on and he said, "who knows," and told G.E. to

just calm down and be cool. Defendant walked toward the other man who was now standing at the open gate in the front yard. Defendant stopped in the middle of the street.

G.E. saw defendant holding the gun in his hand, with his arm down at his side. Defendant and the other man started "banging on each other," meaning they were saying, "*Ese*, where you from?" G.E. then heard at least three gunshots and saw the other man fall to the ground near the gate. He noticed for the first time there was an older woman in the yard and she put her hands up to her face. G.E. was shocked and "frozen" in the back seat. Defendant ran back to the Honda. When he got inside, defendant said "I got him." They then fled the scene.

Jonathan was transported to the hospital where he was pronounced dead. His cause of death was identified as multiple fatal gunshot wounds (one to the lower back and one to the back of the right leg).

2. The Investigation and Defendant's Statements

Detective Jose Bolanos of the Whitter Police Department interviewed Jonathan's sister Maria at the scene shortly after the shooting occurred. She wanted to remain anonymous and appeared fearful. Detective Bolanos also ran the partial license plate number they had been given for a white Honda. He and the other officers investigating the shooting were eventually able to identify codefendant Delci as a possible suspect.

Around 10:00 that same night, Delci was seen driving the white Honda. He was pulled over and detained. Prior to getting out of the vehicle, Delci made gestures with his hands consistent with known gang signs. The Honda was impounded and searched the next morning. The rear driver's side cargo panel was loose. When the panel was removed, a stainless steel

revolver was found inside, along with a "speed loader" for the revolver. Subsequent ballistics testing matched the revolver to the bullets recovered from Jonathan's body during the autopsy.

Sometime in early September 2014, defendant was arrested and taken into custody on an unrelated robbery charge. Detective Chad Hoeppner of the Whittier Police Department, along with another detective, interviewed defendant with respect to the robbery charge and also took a DNA sample. During this questioning, defendant invoked his right to remain silent and requested counsel.

Detective Hoeppner then arranged for an undercover agent to be placed with defendant in a holding cell. The undercover agent was not a law enforcement officer. He had several tattoos and posed as a "seasoned gang member." During the initial portion of the recorded conversation that took place in the cell, defendant identified himself as Suspect, but otherwise nothing of significance was discussed.

The detectives then interrupted the conversation, spoke briefly with defendant and relocated defendant and the undercover agent to a bench outside of the holding cell. During the second portion of the recorded conversation, defendant made the following statements to the undercover agent. He said the police told him they "got the gun," "got the [unintelligible] homeboy" and had fingerprints. The agent said, "[s]upposed to wipe that shit down." Defendant said the gun belonged to his homeboy and called him a "stupid ass." The agent asked why he did not wipe the gun down and defendant responded, "I don't know what the f—k's wrong with that fool. That fool gets me mad." He said he thought his "homie" was "busted for murder too" but did not believe he was talking. The agent said he might

throw defendant under the bus. Defendant said he needed to "call my peoples and tell them." The agent asked "was it an enemy?" Defendant said, "[n]o, some fool." The agent told defendant he was going "to have to run." Defendant said "I know."

The recording then reflects that one of the detectives interrupted to give defendant his card, telling him that "DNA, . . . the other shit we showed you . . . , it doesn't lie man, okay. You want to talk to us, you got my card. All right?" Defendant asked what he would be charged with. The detective said "what do you think? We just told you it was a f---ing homicide."

When the detective left, the conversation between defendant and the agent resumed. The agent asked why defendant did not wear gloves. Defendant said "I did." He also said he did not leave any shell casings, and confirmed a revolver was used. The agent asked why defendant did not tell his homeboy to throw the gun away. Defendant said, "I did, fool. That fool was like I'm going to take care of it." He said his homeboy would "go[] down with me though." Defendant said his homeboy was the driver. They continued to talk and defendant said, "I ain't stressing, fool. It is what it is. Know what I mean? What can I do, fool? I can't cry about it; it's done, done, homie. I just got to thug it out now, fool." Defendant told the agent he never thought he would get caught.

The agent asked defendant what he would be willing to take and defendant said, "I'll take 20, fool." But, he emphasized he was not going to show any remorse. "If you show remorse, that's when they know, fool." Defendant expressed again his irritation with his "homie" for keeping the gun. When asked, defendant said it was ".38 revolver." Defendant said he thought

he had wiped the gun down, "but I guess I didn't wipe it down good."

3. The Charges and Jury Trial

Defendant was charged by information with one count of murder (Pen. Code, § 187, subd. (a) [count 2]), and one count of possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 3]). It was alleged as to count 2 that defendant personally and intentionally used and discharged a firearm causing great bodily injury and death to the victim within the meaning of subdivisions (b), (c), and (d) of section 12022.53. It was further alleged the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22.[3]

Delci was charged as a codefendant of the murder in count 2, and was also charged with possession of a firearm in count 1. Defendant and Delci were tried jointly with separate juries. Delci is not a party to this appeal.

The case proceeded to a jury trial in July 2017. On the first day of trial, defendant moved to exclude the incriminating statements he made to the undercover agent. After entertaining argument, the trial court denied the motion.

The prosecution presented witnesses attesting to the facts about the shooting and the investigation that followed as set forth in parts 1 and 2, *ante*. In addition to testifying about the events of August 30, 2014, Joann and Maria repeatedly denied that Jonathan was a gang member. They also denied Jonathan went out into the street and confronted defendant. Maria

---

[3] Count 3 was dismissed on defendant's motion prior to the jury's deliberations.

conceded that one of her other brothers, Joe, was a member of the Whittier Varrio Locos.

At the outset of G.E.'s testimony, he confirmed he was testifying pursuant to a grant of use immunity. When asked why he was testifying, he said it was "the right thing to do." He testified to the facts set forth in part 1, *ante*.

Detective Hoeppner testified about the investigation of the shooting, including his efforts to interview defendant, as set forth in part 2, *ante*. Portions of defendant's recorded conversation with the undercover agent were played for the jury. Detective Hoeppner also explained that photographs were obtained from defendant's cell phone showing individuals throwing gang signs, and that various comments were found on defendant's Facebook account. In one post, defendant identified himself as Suspect. In a thread of messages posted one day after the shooting, there was a message stating "You heard? It's all bad." Additional messages referenced Delci being charged ("They know he wasn't the shooter, but the mom said she seen everything."); another asking where his car was ("They have it in evidence getting fingerprinted. F—k."); and another message stating "I got to get the f—k out of here."

The prosecution presented the testimony of Detective Edgar Romo, a 17-year veteran of the Los Angeles County Sheriff's Department, assigned to the Operation Safe Streets Bureau that investigates gang-related incidents. He testified to his training and experience regarding Hispanic gangs, and Pico Nuevo in particular. Detective Romo explained the gang's history, territory, gang signs and symbols, and primary activities. Detective Romo said that Pico Nuevo's two main rivals were

Rivera and Pico Viejo, but basically did not get along with any of the other gangs in the area.

In discussing the primary activities of the Pico Nuevo gang, Detective Romo identified two predicate offenses: the 2014 conviction of Edgar Guzman for a violation of Penal Code section 25850, subdivision (a) (carrying a loaded firearm) in case number VA134434, and the 2014 conviction of John Anthony Davis for a violation of section 29800, subdivision (a)(1) (possession of a firearm by a felon) in case number VA134294. The prosecution presented certified abstracts of judgment for both convictions and Detective Romo stated his opinion that both Guzman and Davis were active members of the Pico Nuevo gang.

Detective Romo answered a hypothetical based on the facts of the case and explained his opinion why a murder completed in such fashion was committed not only in association with a gang (three members involved), but for the benefit of the gang (enhancing its reputation). Detective Romo was shown numerous photographs depicting the tattoos of both defendant and codefendant Delci. He identified them as typical Pico Nuevo tattoos, including two of defendant's tattoos as a "PN right below his . . . lower lip" and "a big P on top of his head." He stated his opinion that Delci was an active Pico Nuevo gang member with the moniker Toker, and defendant was an active member of the PeeWees clique of Pico Nuevo with the moniker Suspect.

Defendant exercised his right not to testify. He presented the testimony of Detective Robert Wolfe who said Jonathan had been a member of the Whittier Varrio Locos gang. He also stated that Jonathan's sister Maria told him during an interview that she thought defendant looked to be shooting down at the ground, as if he had not intended to kill her brother.

4. The Verdict and Sentencing

The jury found defendant guilty of first degree murder (count 2). The jury also found true the allegations that defendant personally used and discharged a firearm causing great bodily injury and death to the victim (Pen. Code, § 12022.53, subds. (b)-(d)), and that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The court sentenced defendant to state prison for a term of 60 years to life calculated as follows: a base term of 25 years to life on count 2, plus a consecutive term of 25 years to life for the firearm enhancement (Pen. Code, § 12022.53, subd. (d)), plus a consecutive 10-year determinate term for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(C)). The court awarded defendant 1,121 actual days of custody credits and imposed the following fees: a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $300 parole revocation fine (Pen. Code, § 1202.45), a $40 court security fee (Pen. Code, § 1465.8), and a $30 criminal conviction assessment (Gov. Code, § 70373). The court also ordered restitution pursuant to Penal Code section 1202.4, subdivision (f) to the California Victim Compensation Board and to the decedent's son.

This appeal followed. After briefing was completed, we granted defendant's request to file supplemental briefing to address the decision in *Dueñas*, *supra,* 30 Cal.App.5th 1157, filed on January 8, 2019. Both parties submitted supplemental briefs.

DISCUSSION

1. The Admission of Defendant's Pretrial Confession

Defendant contends the admission of his pretrial statements to an undercover agent violated his constitutional

right against self-incrimination as protected by the Fifth and Fourteenth Amendments. He argues he invoked his right to counsel during custodial interrogation, never waived that right, and therefore his subsequent statements to the agent were inadmissible under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*). We disagree.

Miranda established that the Fifth Amendment privilege against self-incrimination prohibits the admission of "statements given by a suspect during 'custodial interrogation' without a prior warning." (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 (*Perkins*), quoting *Miranda*, *supra*, 384 U.S. at p. 444.) The high court's crafting of the *Miranda* warnings grew out of the concern that an individual subjected to official custodial interrogation faced " 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " (*Perkins* at p. 296, quoting *Miranda* at p. 467.)

Numerous cases that have followed and interpreted *Miranda* have explained that " '[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, *but only in those types of situations in which the concerns that powered the decision are implicated*.' " (*Perkins*, *supra*, 496 U.S. at p. 296, italics added.) " 'Absent "custodial interrogation," *Miranda* simply does not come into play.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.)

Here, defendant was in custody in September 2014 and was being questioned about a robbery charge unrelated to the murder of Jonathan on August 30. Defendant invoked his right to remain silent and asked for counsel. Defendant acknowledges

that interrogation ceased at that point and he was returned to a holding cell. Defendant finds fault with what occurred at that point, namely the use of an undercover agent to elicit statements from him.

Defendant argues he never waived the rights he had already invoked and that the undercover operation therefore ran afoul of the rule announced in *Edwards*, *supra*, 451 U.S. 477. Equally violative of *Edwards*, according to defendant, was the fact the officers interrupted the conversation between defendant and the agent to intimidate defendant with false information in order to stimulate further conversation. Defendant reads *Edwards* too broadly.

Edwards held that once a defendant has invoked his or her rights, no further *interrogation* may take place without the presence of counsel, unless the defendant makes a voluntary and knowing waiver. *Edwards* did not foreclose the use of otherwise voluntary statements by a defendant who had invoked his or her rights during questioning. "[W]e do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any *custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked* and there would be no occasion to determine whether there had been a valid waiver. *Rhode Island v. Innis* makes this sufficiently

clear." (*Edwards*, *supra*, 451 U.S. at pp. 485-486, italics added; accord, *Rhode Island v. Innis* (1980) 446 U.S. 291, 300 ["Volunteered statements of any kind are not barred by the Fifth Amendment"].)

The incriminating statements obtained from defendant after he had invoked his rights were *not* the product of interrogation or its functional equivalent. Defendant was speaking freely and voluntarily to a person he believed to be a fellow detainee and gang member. "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect." (*Perkins*, *supra*, 496 U.S. at p. 296.) "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Id*. at p. 297; accord, *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 284.)

We conclude the incriminating statements made by defendant to the undercover agent were voluntary. When he spoke with the agent, defendant was *not* "faced with the coercive *combination* of custodial status *and* an interrogation *the suspect understands as official*." (*People v. Tate* (2010) 49 Cal.4th 635, 685.) As such, there was no need for obtaining a waiver from defendant, nor was the presence of counsel required. The use of the undercover agent did not violate the rule announced in *Edwards*, nor violate defendant's constitutional right against self-incrimination. The court did not err in admitting defendant's statements.

2. The Prosecutor's Closing Argument

Defendant argues the prosecutor committed misconduct during closing argument by vouching for two prosecution witnesses (G.E. and Detective Hoeppner), and by arguing his opinion about defendant's guilt.

We reject defendant's contention at the outset on the grounds of forfeiture. No objections to the allegedly improper statements were raised by defendant during argument. Nor did defendant request the jury be admonished. "It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328 (*Seumanu*); accord, *People v. Davenport* (1995) 11 Cal.4th 1171, 1209.) Moreover, nothing in the record suggests that making an objection would have been futile, or that an admonition would have been insufficient to cure any alleged harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) We therefore have no basis on which to excuse the forfeiture.

Nevertheless, even if we considered the merits, we would reject the claim. " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*Hill*,

supra, 17 Cal.4th at p. 819; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 679 (*Fuiava*).)

With respect to the testimony of G.E., defendant finds fault with the following statements by the prosecutor. "The other thing that was striking in this case that separates it from others is [G.E.]. And how interesting was it to see and meet and learn from this individual what happened." "[I]nherently, we want to root for this kid." The prosecutor explained that G.E. had been heading down the path of being a "gangster," "[b]ut one of the compelling things in this case," what was "great to see and hear" was that despite defendant's efforts to groom G.E. into becoming a gangster, G.E. changed his path. "And you can tell that he wanted to do the right thing, and that's why he was here. I get it. [¶] We did offer immunity to [G.E.], but ultimately, this is about the greater truth."

As to Detective Hoeppner, the investigating officer, the prosecutor said "I want you to know that we have gone to great lengths to make sure that both sides get a fair trial." Detective Hoeppner recorded the interviews because he "care[d] so much about doing a good job." The prosecutor continued by saying the prosecution team had been "relentless in our pursuit of justice" and "because of the hard work that Detective Hoeppner has put into the case, we have an idea of what happened. We know who the shooter is."

Defendant argues these statements constituted improper vouching by the prosecutor as to the credibility and integrity of G.E. and Detective Hoeppner. He further argues the statement "[w]e know who the shooter is" was an improper personal opinion about defendant's guilt.

"A criminal prosecutor has much latitude when making a closing argument. Her argument may be strongly worded and vigorous so long as it fairly comments on the evidence admitted at trial or asks the jury to draw reasonable inferences and deductions from that evidence. [Citation.] ' "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching." ' " (*Seumanu*, *supra*, 61 Cal.4th at p. 1330.)

Defendant has not shown the prosecutor improperly vouched for G.E. and Detective Hoeppner. Nothing in the objected-to statements suggested there was other evidence not presented at trial that supported the veracity of the prosecution witnesses. For example, the prosecutor relied on facts in the record to argue why the jury should find G.E. credible, namely that he had turned his life around from an initial foray into gang life and made the decision to testify against his former gang members because it was "the right thing to do." It was not improper for the prosecutor to argue that was relevant to G.E.'s credibility. The prosecutor did not state that, apart from anything related to their testimony, he simply believed his witnesses were more honest or credible. We do not find any reasonable likelihood the jury " 'construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Thomas* (2012) 53 Cal.4th 771, 797.) Defendant has not shown any conduct by the prosecutor amounting to a denial of due process or conduct that can be fairly characterized as deceptive and reprehensible. (*Hill*, *supra*, 17 Cal.4th at p. 819.)

In the alternative, defendant argues his trial counsel was ineffective for failing to object to the prosecutor's argument and failing to request the jury be admonished accordingly.

On direct appeal, as here, a defendant's burden to establish ineffective assistance can be stringent. A defendant "must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) When the record on appeal " ' "sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," *the claim on appeal must be rejected*.' [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267, italics added; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [ineffective assistance claim properly resolved on direct appeal only where record affirmatively discloses no rational tactical purpose for counsel's actions].)

As we explained above, the prosecutor's comments did not amount to improper vouching. Even assuming some of the comments were borderline, defense counsel could have had any number of reasonable tactical grounds for not objecting or highlighting such comments. " '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . . .' [citation], and 'a mere failure to object to evidence or argument

seldom establishes counsel's incompetence.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 675.) While we are mindful that counsel's performance must remain subject to meaningful scrutiny, defendant has not met his burden to show ineffective assistance below.

3. The Evidence Supporting the Gang Enhancement

Defendant next contends the gang enhancement is not supported by substantial evidence. Defendant's argument is twofold. He first argues the testimony of Detective Romo was conclusory and insufficient to establish that the individuals (Guzman and Davis) who committed the crimes offered as predicate offenses were members of the Pico Nuevo gang. Second, defendant argues Detective Romo's testimony regarding Guzman and Davis was inadmissible case-specific hearsay under *Sanchez*, *supra*, 63 Cal.4th 665.

This is the evidence defendant challenges as insufficient. After the court sustained objections by codefendant Delci when Detective Romo began to reference discussions with other officers as part of the basis of his knowledge about Guzman, Detective Romo was asked if he had reviewed photographs of Guzman's tattoos. Detective Romo confirmed that he had and that the tattoos were characteristic of Pico Nuevo tattoos. None of the photographs was offered into evidence. Detective Romo stated that in his opinion, Guzman was an active member of the Pico Nuevo gang.

Detective Romo also testified he had reviewed photographs of Davis's tattoos and that Davis's tattoos were typical Pico Nuevo tattoos such as the letters PN. None of the photographs of Davis's tattoos was offered into evidence. Detective Romo then explained he had personally interacted with Davis on one

occasion and knew his gang moniker to be Spooky. In his opinion, Davis was also an active member of the Pico Nuevo gang.

Before addressing the sufficiency of this evidence, we address the *Sanchez* argument.

Defendant contends Detective Romo improperly relayed case specific hearsay in violation of *Sanchez* in attesting to Guzman's and Davis's membership in Pico Nuevo. However, as respondent correctly argues, defendant failed to raise any objection to Detective Romo's testimony. Defendant also did not join in the relevance and hearsay objections raised by counsel for codefendant Delci to the initial questions posed to Detective Romo about Guzman. Nothing in the record indicates that such objections would have been futile. Accordingly, defendant's contention has been forfeited. (*People v. Chism* (2014) 58 Cal.4th 1266, 1292-1293 [finding forfeiture where defense counsel failed to object, failed to join in codefendant's objection and failed to request limiting instruction that evidence was admissible only as to the codefendant].)

Even if we were to consider the argument, we would reject it because Detective Romo's testimony about the predicate offenses did not relate case specific facts or hearsay to the jury.

Detective Romo based his opinion about Guzman's gang membership on his review of photographs depicting Guzman's tattoos. Photographs are not hearsay. " 'Hearsay is defined as an out-of-court "statement." (Evid. Code, § 1200.) A statement is defined for this purpose as an "oral or written verbal expression or . . . nonverbal conduct of *a person*" intended as a substitute for oral or written expression. (Evid. Code, § 225, italics added.) Only people can make hearsay statements; machines cannot.' "

(*People v. Garton* (2018) 4 Cal.5th 485, 506 (*Garton*), quoting *People v. Leon* (2015) 61 Cal.4th 569, 603.) Nothing in *Sanchez* prevented Detective Romo from relying on photographs in forming his opinions. (*Garton,* at pp. 506-507 [concluding expert could relay opinions based on review of autopsy photographs].)

As to Davis, Detective Romo relied not only on a review of photographs but his prior personal contact with Davis. Therefore, his opinion as to Davis did not convey hearsay to the jury or otherwise violate the letter or spirit of *Sanchez*.

Moreover, under *Sanchez*, "[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) Detective Romo's testimony about Guzman and Davis went to establishing the requisite predicate offenses, and did not pertain to the "particular events and participants" of the murder being tried.

Rather, predicate offenses are relevant to establishing "a pattern of criminal gang activity." (Pen. Code, § 186.22, subds. (a) & (e).) *Sanchez* "made clear that an expert may still rely on general 'background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory,' which is relevant to the 'gang's history and general operations.' (*Sanchez*, [*supra*, 63 Cal.4th] at p. 698.) This plainly includes the general background testimony [pertaining to the gang's] operations, primary activities, and pattern of criminal activities . . . . It also falls in line with the *Sanchez* court's hypothetical example that an expert may testify that a diamond tattoo is 'a symbol adopted by a given street gang' and the presence of the tattoo signifies the person belongs to the gang. (*Id*. at p. 677.) By permitting this type of background testimony,

the court recognized it may technically be based on hearsay, but an expert may nonetheless rely on it and convey it to the jury in general terms. (*Id*. at p. 685.)" (*People v. Meraz* (2018) 30 Cal.App.5th 768, 781-782 (*Meraz*); accord, *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.)[4]

Defendant contends that even if Detective Romo's testimony about Guzman's and Davis's gang membership was properly admitted, it was nonetheless inadequate because it was conclusory, amounting to nothing more than bald assertions of opinion.

Once again, defendant failed to raise such an objection in the trial court and has therefore forfeited his argument. But, the argument is without merit. As we already explained above, Detective Romo attested to having had personal contact with and knowledge about Davis. Combined with his expertise and his review of the photographs depicting Davis's tattoos, his opinion that he was an active gang member was amply supported.

Detective Romo's opinion that Guzman was a member of Pico Nuevo was based on his review of photographs. As we found above, an expert may rest an opinion on photographs. In any event, defendant cannot establish any prejudice based on Detective Romo's testimony about Guzman because the charged offense committed by defendant and his codefendant Delci

---

[4] Other courts have concluded testimony related to predicate offenses is case specific. (See, e.g., *People v. Ochoa* (2017) 7 Cal.App.5th 575 and *People v. Lara* (2017) 9 Cal.App.5th 296.) Defendant also cited to *People v. Huynh* (2018) 19 Cal.App.5th 680 for the same proposition, but by order dated May 9, 2018, the Supreme Court denied review of *Huynh* and ordered the opinion

qualifies as a predicate offense. (*People v. Loeun* (1997) 17 Cal.4th 1, 10 [prosecution may "rely on evidence of the defendant's commission of the charged offense" to establish the requisite pattern of two or more predicate offenses].) There was substantial evidence of defendant's and Delci's membership in the Pico Nuevo gang, including numerous photographs of their gang-related tattoos and G.E.'s testimony about their gang monikers and activities. Combined with the evidence regarding Davis and his prior conviction, there was substantial evidence of two predicate offenses within the meaning of Penal Code section 186.22.

4. Cumulative Error

Defendant argues the combined evidentiary errors and prosecutorial misconduct deprived him of due process. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] *A predicate to a claim of cumulative error is a finding of error*. There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068, italics added; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [finding that to the extent any errors occurred, they were minor and "[e]ven considered collectively" they did not result in prejudice].)

As we explained above, we found no error in the admission of defendant's pretrial statements. As for the prosecutorial misconduct, we concluded that even if we excused defendant's forfeiture, there was no misconduct. And, as to the gang

---

decertified. We believe *Meraz* is the better reasoned and more faithful to *Sanchez*.

evidence, there was substantial, nonhearsay testimony, and any claimed error was harmless. Hence, defendant's contention is without merit.

5. The Penal Code Section 12022.53 Enhancement

Defendant argues that in the event this court is inclined to affirm his conviction, he is nonetheless entitled to a remand for resentencing in light of the passage of Senate Bill No. 620 (2017–2018 Reg. Sess.) during the pendency of this appeal. Respondent concedes a limited remand is appropriate. We agree.

On January 1, 2018, Senate Bill No. 620 took effect, amending Penal Code section 12022.53, subdivision (h). The amendment restored discretion to trial courts to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.) The statute in effect at the time of defendant's sentencing mandated imposition of the enhancement.

The discretion to strike a firearm enhancement under Penal Code section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) It is undisputed defendant's appeal was not final on January 1, 2018, and he is therefore entitled to the benefit of the amendment. (See, e.g., *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; and, *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"].)

We have found nothing in the record of the sentencing proceedings that would indicate a remand would be futile.

Accordingly, we remand to allow the trial court the opportunity to exercise its newly granted discretion under subdivision (h) of Penal Code section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)

On remand, the trial court may exercise its discretion under Penal Code section 12022.53, subdivision (h), to strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b). If the court imposes the 20-year enhancement under subdivision (c), it must then strike the 25-year-to-life enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). If the court imposes the 10-year enhancement, it must then strike the 20-year and 25-year enhancements under subdivisions (c) and (d). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (Pen. Code, § 1385, subd. (b); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on

the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant's criminal record and may affect the award of custody credits.

6. Imposition of the Court Security Fee, Criminal Conviction Assessment and Restitution Fine

In supplemental briefing, defendant requests we reverse imposition of the court security fee and criminal conviction assessment and impose a stay of the restitution fine until such time as the People prove he has the ability to pay such assessments. Defendant argues the court never made any finding on his ability to pay and that the statutes requiring imposition of the assessments without such a finding are fundamentally unfair and violate due process. As defendant concedes, his argument "rests substantially" on *Dueñas*, *supra*, 30 Cal.App.5th 1157.

Defendant forfeited any challenge to the imposition of the two fees and the restitution fine based on his alleged inability to pay. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to object to imposition of restitution fine under Pen. Code, former § 1202.4 based on inability to pay].)

Defendant concedes he did not raise any objection to the imposition of the assessments in the trial court on any ground. But, he argues there was no forfeiture because his due process claim presents a pure question of law that can be raised for the first time on appeal. Defendant further argues an objection to the mandatory assessments on the grounds of inability to pay

would have been futile prior to *Dueñas* and therefore, this court should excuse his failure to object. We are not persuaded.

First, a reviewing court may indeed consider a claim raising a pure question of law on undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) But defendant does not ask us to review a pure question of law based on undisputed facts. Rather, he requests a factual determination of his alleged inability to pay based on a record that contains nothing more than his reliance on appointed counsel at trial. Moreover, a reviewing court may excuse the failure "to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) But again, defendant has not shown that an objection would have been futile below. While the fees and fine challenged here were mandatory assessments, nothing in the record of the sentencing hearing indicates that defendant would have been foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments. Defendant plainly could have made a record had his ability to pay actually been an issue.

Even if we excused defendant's forfeiture, we would reject his claim. Nothing in the record supports the contention that the imposition of the $300 restitution fine (the statutory *minimum* amount for a felony), the $40 court security fee and the $30 criminal conviction assessment was fundamentally unfair to defendant or violated due process. The facts here bear no similarity to the unique factual circumstances presented in *Dueñas*.

Defendant was given notice these assessments would be imposed in the probation report prepared prior to sentencing.

After a lengthy sentencing hearing at which defendant participated with the assistance of counsel, the court sentenced defendant to a 60-year prison term and also imposed the now-challenged assessments. In the absence of objection by defendant, the trial court could presume the $370 assessments would be paid out of defendant's future prison wages. (See, e.g., *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) Even if the trial court chooses to strike the entire enhancement on remand, defendant would still face a minimum of 35 years in state prison. Defendant has ample time within which to satisfy the $370 in assessments from his future prison wages. Defendant has not articulated any basis for finding prejudice or a due process violation.

DISPOSITION

The sentence on the firearm enhancement pursuant to Penal Code section 12022.53 is reversed. The case is remanded to the superior court for the limited purpose of allowing the court to conduct further sentencing proceedings consistent with this opinion. The superior court is directed to exercise its sentencing discretion under section 12022.53, subdivision (h). Thereafter, the superior court is directed to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation.

The judgment of conviction is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. STRATTON, J.